Supreme Court, U.S.
FILED

031195 FEB 13 2004

No. _____

In The

Supreme Court of the United States

FRIEDA GILL,

Petitioner,

vs.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Commissioner of Social Security Administration may be rewarded by receipt of a favorable decision denying Social Security benefits even though she deliberately lied about the facts and caused severe injury to an individual.

2. Whether equitable estoppel will lie against a governmental agency in the face of a *deliberate lie* by the agency.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1) is not reported No. 02-57170. The order of the Ninth Circuit denying Petitioner's request for rehearing and request for rehearing en banc (App. 18) is not reported. The judgment of the District Court in and for the Central District of California (App. 3) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on August 22, 2003. The Ninth Circuit entered an order denying Petitioner Gill's timely petition for rehearing and petition for rehearing en banc on November 19, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Regulation 404.408a of the Code of Federal Regulations, Title 20 ("20 CFR") entitled "Reduction where spouse is receiving a government pension," which states unless you meet one of the exceptions in paragraph (b) of this section your monthly Social Security benefits as a widow will be reduced each month you are receiving a monthly pension from a Federal government agency for which you were employed in work not covered by Social Security on the last date of such employment.

STATEMENT OF THE CASE

Appellant, born May 18, 1926, worked as a Disclosure Specialist for the Internal Revenue Service ("IRS"). In February 1991 she went to the Social Security Office in Van Nuys and applied for widow's insurance benefits. She brought documents showing she was a Federal Employee and would receive a Federal pension on retirement. On April 15, 1991 she received a letter from the Social Security Administration ("SSA") informing her that her application for widow's benefits had been approved beginning April 1991. In February 1995 she personally went to the Social Security Office and was informed she would receive $832 a month in widow's benefits (A.R. 62). On December 15, 1995 she received a letter from SSA stating her widow's benefits would be $811 a month starting January 3, 1996 (A.R. 59, 133). On December 27, 1995 she was informed by SSA she had been overpaid $4992.60 for the period June 1995 through November 1995 as she should have been paid $0.00 for that period (A.R. 134). The issue of government pension offset (GPO) had not been brought up prior to this time.

Following hearing on February 26, 1999 the Administrative Law Judge ("ALJ") issued a decision finding Gill not at fault in the overpayment (A.R. 36). He found further that believing she would receive widow's insurance benefits she retired earlier than she would have had she known of the offset, thus retiring at a reduced rate. He found she detrimentally relied in good faith on SSA's misrepresentations. Evidence indicates that on April 2, 1991 G. McArdle reported in a notice of contact she had phoned Gill and told her she was subject to the offset. Gill testified she was at work that day and never received such a call. The Appeals Council affirmed the waiver of

overpayment but stated the Administration may not be equitably estopped in reference to the GPO as the unauthorized act of an employee who did not key in the GPO offset may not vary requirements established by Congress. Following appeal to United States District Court and submission of Motion for Summary Judgment by parties on the issue of whether SSA may be equitably estopped to deny widow's insurance benefits, the Court remanded the case for further proceedings.

Following a supplemental hearing on September 6, 2001 the ALJ issued a recommended decision finding estoppel does not lie against SSA. On April 5, 2002 the Appeals Council adopted the recommended decision of the ALJ. On April 19, 2002 the case was appealed to United States District Court, Central District of California. Following submission of Motion for Summary Judgment by parties the Court set the case for oral argument on November 13, 2002 and advised parties that the Court tentatively finds that *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), precludes the award of benefits Plaintiff is seeking and encouraged parties to continue to explore the possibility of settlement, if any. On November 15, 2002 United States Magistrate Judge issued Report and Recommendation recommending Plaintiff's Motion for Summary Judgment be denied. Plaintiff filed Objection to the Report and Recommendation of United States Magistrate Judge. On December 4, 2002 the District Court accepted the recommendation of United States Magistrate Judge granting judgment in favor of the Commissioner.

On December 16, 2002 Plaintiff timely appealed the case to United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE FACTS

Appellant, born May 18, 1926, worked for the IRS. In February 1991 she went to the Social Security Office in Van Nuys and applied for widow's insurance benefits. She brought documents showing she was a Federal employee and would receive a Federal pension on retirement. The representative told her that she would receive a decision on her application. On April 15, 1991 she received a letter from SSA informing her her application for widow's insurance benefits had been approved beginning April 1991 (A.R. 121). In February 1995 prior to retirement she personally went to the Social Security office and was informed she would receive $832 a month in widow's benefits (A.R. 62). She would not have retired in June 1995 had she known she would not receive widow's benefits but would have kept on working to receive a larger pension. On both occasions, February 1991 and February 1995, she identified herself as a Federal employee who would receive a Federal pension. Nothing was said about FERS (Federal Employees Retirement System) at a group retirement seminar at work. There was no mention of a government pension offset (A.R. 68). On December 15, 1995 she received a letter from SSA stating her widow's benefits would be $811 a month starting January 3, 1996 (A.R. 59, 133). Up to that time she had received no word from SSA that she would not be entitled to widow's benefits (A.R. 59). On December 27, 1995 she received a letter from SSA that she was overpaid $4992.60 in Social Security benefits for the period June 1995 through November 1995 as she should have been paid $0.00 during that period (A.R. 134). She gave up her right to continue working on reliance on the government's letters that she was eligible for widow's benefits. In 1996 when she went to

the Social Security office the representative handed her a document and stated that, on the initial interview she should have been told that at her age she needed to pay only four years into Social Security and the GPO would be eliminated (A.R. 64).

Following hearing on February 26, 1997 the ALJ issued a decision on December 7, 1997 finding Plaintiff was without fault in the overpayment and waived adjustment or recovery of the overpayment (A.R. 36). He found further, believing she would receive widow's insurance benefits, she retired much earlier than she would have, thereby retiring at a reduced pension. He found she detrimentally relied in good faith on the incorrect representations of SSA that she would receive the benefits (A.R. 35). Knowledge of the GPO cannot be ascribed to the claimant (A.R. 35). The Appeals Council stated that at filing claimant notified SSA she was a Federal employee and would be entitled to a Federal pension. The award letter contained no reference to the GPO (government pension offset) and was the result of the Administration's failure to key in the GPO code. The GPO provision was created by statute and none of the exceptions to the GPO hold. The failure to key in the GPO effect was an unauthorized act of a government employee and cannot vary the requirements established by Congress (A.R. 7,8). The waiver of the overpayment was affirmed but the Appeals Council found the Administration was not equitably estopped from applying the GPO provisions in claimant's case. The case was timely appealed to United States District Court on August 30, 1999. Following submission of Motion for Summary Judgment by parties the District Court on March 10, 2000 filed Report and Recommendation of

United States Magistrate Judge and recommended remand for further proceedings.

Following a supplemental hearing on September 6, 2001 the ALJ issued a recommended decision on October 31, 2001 finding that estoppel does not lie against the Social Security Administration (A.R. 184-191). On April 5, 2002 the Appeals Council adopted the recommended decision of the ALJ (A.R. 175, 176). On April 19, 2002 the case was appealed to United States District Court, Central District of California. Following submission of Motion for Summary Judgment by parties United States Magistrate Judge Carolyn Turchin set the matter for oral argument on November 13, 2002 and advised counsel the Court tentatively finds that *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), precludes the awarding of benefits Plaintiff is seeking and encouraged parties to continue to explore the possibility of settlement, if any, in this matter. At oral argument, Plaintiff stated that the alleged telephone call of April 2, 1991 by a representative of SSA to Plaintiff advising her the GPO would *apply* was a *deliberate* (emphasis added) lie and coverup and that in *Socop-Gonzalez v. Immigration and Naturalization Service*, 272 F. 3d 1176, 1184 (9th Cir. 2001), Judge Pregerson of the Ninth Circuit Court of Appeals reported equitable estoppel applies against the government if the misconduct is affirmative. A deliberate lie or a pattern of false promises is required for affirmative misconduct and in this case there is evidence of a deliberate lie and a pattern of false promises. On November 15, 2002, United States Magistrate Judge filed Report and Recommendation and ordered Plaintiff's Motion for Summary Judgment be denied. Plaintiff filed objections to the Report and Recommendation of United States Magistrate Judge stating the Administration has not

rebutted the deliberate lie of G. McArdle that on April 2, 1991 she indicated in a Report of Contact that she telephoned claimant and informed her the GPO would apply to claimant (A.R. 77). Had such a call been made, claimant would have had ample time to remedy the situation and this case fits into the loophole in *Office of Personnel Management* that the Court will not embrace a rule that no estoppel will ever lie against the government. In *BE&K Construction Company v. National Labor Relations Board*, 122 S.Ct. 239 (6/24/02), the Court refused to adopt a strict standard prohibiting law suits both objectively baseless and subjectively intended to abuse process stating there may be cases where liability may be available.

There is a clear pattern of false promises by SSA which Judge Pregerson stated is a requirement for affirmative misconduct.

Appellant applied at the Van Nuys Social Security office for correction of her earnings record for six years where wages were not recorded in SSA records. This correction of earnings would provide for her being fully insured in her own right, thereby allowing her to get the better of two pensions. Since her husband's benefit would be larger than hers, she would be eligible for widow's insurance benefits. On December 4, 2002 the District Court adopted the recommendation of United States Magistrate Judge and ordered Judgment entered in favor of the Commissioner.

On December 16, 2002 the case was timely appealed to United States Court of Appeals for the Ninth Circuit.

ARGUMENTS

1.

Petitioner Is Entitled to Widow's Insurance Benefits

Appellant Gill filed for widow's insurance benefits in February 1991. She brought documents showing she was a Federal employee and would receive a Federal pension on retirement. On April 15, 1991, SSA sent her a "Notice of Award" that her application for widow's insurance benefits was approved. She continued to receive a series of written notices that she would receive widow's benefits, none of which alerted her to the fact that the GPO ("government pension offset") applied to her. The ALJ expressly found that Gill detrimentally relied on the incorrect representation by the Administration that she would receive widow's benefits and believing she would receive widow's benefits upon retiring retired much earlier than she would have had she known of the offset, thereby retiring at a reduced pension level (A.R. 17). The Appeals Council found that any misrepresentation to claimant was based on a keying-in error and relying on SSR 70-19c found SSA was not estopped from applying the GPO. The United States District Court remanded the case after the first hearing on the issue of whether Plaintiff has shown SSA's behavior rose to the level of "affirmative misconduct" or whether the traditional elements of estoppel have been satisfied. The District Court also found that it does not follow that the person who entered the data erroneously, though it might have been, acted outside the scope of his or her authority in entering it.

The Ninth Circuit has held "where justice and fair play require it" estoppel will be applied against the government but the government may not be estopped on the

same terms as a private litigant. *Watkins v. U.S. Army*, 875 F. 2d 699, 706-707 (9th Cir. 1989). Beyond the requirement of traditional estoppel two additional requirements must be met before the government can be estopped. First, the party seeking to raise estoppel must establish affirmative misconduct going beyond mere negligence and second, estoppel will only apply where the government's wrongful act will cause a serious injustice and the public's interest will not suffer undue damage by the imposition of the liability.

The traditional requirements of estoppel are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct should be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. Evidence reveals that the Social Security representative knew the facts; the representative intended her conduct to be acted on and acted so that Appellant Gill had a right to believe it was so intended; Appellant was ignorant of the true facts; and she detrimentally relied on the representative's conduct to her severe financial injury.

A key issue in the case is the so-called Report of Contact of April 2, 1991 (A.R. 77) in which G. McArdle called Appellant by telephone telling her that she would be offset by the GPO. Appellant never received such a call – she was working that day. This would appear to be a deliberate lie on the part of G. McArdle and must not be considered mere negligence. Had Appellant received such a call on April 2, 1991 the Administration would not have sent her a letter on April 15, 1991 that her application for widow's benefits was approved (A.R. 78). There would have been no need for Appellant to go to the district office

in February 1995 before she retired to make sure she was going to receive widow's insurance benefits when she retired. Had she been informed of the GPO in April 1991 she would have continued working at the IRS and retired at a date later than June 1995 with a much higher pension. In *Socop-Gonzalez*, supra, Judge Pregerson of this Court reported equitable estoppel applied against the government if the misconduct is affirmative. Affirmative misconduct requires a deliberate lie or a pattern of false promises. In the instant case, G. McArdle's Report of Contact of April 2, 1991 is a deliberate lie and used as a coverup for the government's wrongful act. There is also a pattern of false promises. She received a letter on April 15, 1991 approving her application for widow's insurance benefits (after the so-called Report of Contact of April 2, 1991). On July 9, 1995, she was notified that she would receive benefits from June 1995 (A.R. 87). On July 17, 1995 she received a letter that she would receive a check for $693.80 which is the money due her through July 1995 and after that she will receive $786 each month (A.R. 90). On September 13, 1995, she was notified her next check will be for $555.50 which includes benefits through September 1995 (A.R. 95). On September 27, 1995, she received a letter stating she will receive a check for $138.30 because the Administration is refunding excess premiums from medical insurance (A.R. 97). Then on December 27, 1995, she was told she was overpaid $4992.60 for June 1995 through November 1995 when she should have been paid $0.00 for that period.

This is a pattern of false promises as stated by Judge Pregerson in *Socop-Gonzales*, supra. In *McDonald v. Schweiker*, 537 F. Supp. 47 (N.D. Indiana 1981), the Court found that SSA was estopped from relying on the absence

of a prescribed application to deny benefits beginning in November 1978 stating SSA's misrepresentation caused the Plaintiff to fail to take an action that could not be corrected at any time and such misrepresentation constitutes affirmative misconduct triggering estoppel.

Following remand by the United States District Court, the ALJ issued a decision after the supplemental hearing finding that SSA did not engage in affirmative misconduct and that while its actions were negligent there is no showing of a deliberate attempt to misinform Gill and accordingly no showing that the negligence rose to the level of wanton disregard of the facts (A.R. 190). He also observed that the fact that Gill did not attempt to find employment and earn additional quarters of coverage on her own account gives rise to concern as to whether she sustained the necessary injury to warrant recovery under an estoppel theory. On the contrary, Appellant was sixty-nine (69) years old when she retired in June 1995 and when informed she was not eligible for widow's insurance benefits due to the GPO she applied for work at her former employer (IRS) but was told there were no openings. She also filed an application for government employment. Therefore, she sustained the necessary injury to warrant recovery under an estoppel theory.

Following appeal to United States District Court after the supplemental hearing and submission of Motion for Summary Judgment by parties the United States Magistrate Judge informed parties that the Court relies on *Office of Personnel Management* and while estoppel remains a potentially valid claim against the Federal government when there is showing of affirmative misconduct the judicial branch may not use equitable estoppel to grant Plaintiffs a money remedy that Congress has not authorized (holding

that the Appropriations Clause of the Federal Constitution precludes a claim of payment of money from the Public Treasury contrary to a statutory appropriation). The Supreme Court observed that otherwise the natural consequences of a rule that imposed liability on the Federal government for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision for information in order to limit liability. Not only would valuable informational programs be lost to the public but the greatest impact of this loss would fall on those of limited means who can least afford the alterative of private advice. The Court concluded that Plaintiff is precluded from estopping the government based on the standard for invoking equitable estoppel.

In *Office of Personnel Management*, supra, the Court stated, "But it remains true that we need not embrace a rule that no estoppel would be against the government in any case in order to decide this case. We leave for another day whether an estoppel claim would ever succeed against the government." Justice Stevens stated that the dispute in this case is not about whether an appropriation has been made but is instead about what rules govern administration of an appropriation that has been made. Once the issue is appropriately framed it quickly becomes obvious that the Court's resolution of it is untenable. Justice Marshall with whom Justice Brennan joined dissenting stated the majority resolves the issue by holding as a general rule that a litigant may not succeed in a claim for payment of money from the Treasury in the absence of a statutory appropriation. Most fundamentally Richmond's collection of disability benefits would be fully consistent with the relevant appropriation.

In *BE&K Construction Company v. National Labor Relations Board*, 122 S.Ct. 239 (June 24, 2002), the Court rejected the opinion of Justice Scalia and Justice Thomas that the Court adopt a stricter standard prohibiting law suits intended to abuse the process stating that there may be cases where liability may be available. This case illustrates the Supreme Court's reluctance not to close the door on cases which have merit.

Evidence reveals affirmative misconduct by the government in the instant case – the deliberate lie by G. McArdle on April 2, 1991 in which she indicates she phoned Gill and informed her she was subject to the offset by GPO (A.R. 77). Appellant was at work that day. No such call was made. Therefore, this is a deliberate lie on the part of the Administration and satisfies the requirement of affirmative misconduct. This is an attempt to cover up its wrongful act. Had such a call been made on April 2, 1991 Gill would have had ample time to remedy the situation. She could have changed from CSRS to FERS and paid into Social Security and would have been fully insured on her own accord. She also could have continued working after June 1995 and greatly increased her pension. The deliberate lie has caused serious injustice to an innocent person.

There is also a pattern of false promises by the Administration. Appellant was informed on April 15, 1991 (which is subsequent to the so-called April 2, 1991 telephone call) that her application for widow's insurance benefits had been approved beginning 1991. In February 1995 Gill personally went to the Social Security office and was informed she would receive $832 a month in widow's benefits (A.R. 62). On July 9, 1995 she received a letter from the Administration informing her she would be paid widow's benefits beginning June 1995 (A.R. 87). On July

13, 1995 she received a letter stating $46.10 would be deducted for medical insurance (A.R. 88A) On July 17, 1995 SSA's letter informed her she would receive $786 in widow's benefits after July 1995 (A.R. 90). On September 13, 1995 SSA informed Gill that her next check of $555.56 includes benefits due through September 1995 and after that she would receive $786 each month (A.R. 95). On September 27, 1995 SSA's letter to Gill informed her she would soon receive a check for $138.36 because the Administration is refunding excess premiums for medical insurance (A.R. 97). This series of letters from the Administration must be determined a pattern of false promises required for a finding of affirmative misconduct as reported by Judge Pregerson in *Socop-Gonzales*, supra.

It would appear the requirements for a finding of equitable estoppel have been met. The widow's insurance benefits are based on Appellant's husband's account. He paid into the system and was fully insured when he passed away.

2.

Petitioner Has Met Her Burden of Proving the Elements of Equitable Estoppel

In *Socop-Gonzalez v. Immigration and Naturalization Service*, 272 F. 3d 1176, 1184 (9th Cir. 2001), Judge Pregerson of this Court reported equitable estoppel applies against the government if the misconduct is affirmative and affirmative misconduct requires a deliberate lie or a pattern of false promises. Evidence substantiates that the so-called Report of Contact of April 2, 1991 in which G. McArdle reported calling Appellant and telling her she was subject to the GPO ("Government Pension Offset")

never occurred. Had this call occurred the Administration would not have sent the letters thereafter informing her she was eligible for widow's benefits and would receive them when she retired and Appellant would not have gone to the District Office in February 1995 (prior to retirement) to make sure she would receive the widow's benefits when she retired and she would not have retired. She could have worked a little while longer and received a much larger pension. Appellant has established affirmative misconduct going beyond mere negligence. The government's wrongful act has caused serious injustice and the public's interest will not suffer undue damage by imposition of the liability.

Evidence substantiates that when Appellant went to the district Office in February 1991 and was told she was eligible for widow's benefits she brought with her documents showing she would receive a government pension when she retired. The representative to whom Appellant spoke knew the facts, the representative's conduct was such that Appellant had a right to believe what was told her was so; Appellant was ignorant of the true facts; and Appellant relied on the representative's conduct to her injury. Appellant detrimentally relied on the fact that she would receive widow's benefits – otherwise, she would have kept on working at the IRS and would have received a larger government pension.

The deliberate lie by G. McArdle was a deliberate attempt at a coverup. The misinformation provided Appellant in February 1991 was followed by the so-called telephone call on April 2, 1991. It seems odd that the so-called telephone call occurred a few months after Appellant went to the District Office in February 1991 and yet many letters were sent thereafter to Appellant regarding

the amount of the benefit she would receive in widow's benefits.

Defendant stated that in absence of highly unusual circumstances the agency cannot be equitably estopped from applying valid statutory provisions due to detrimental reliance based upon misinformation provided by SSA employees. A deliberate lie by an SSA employee used as a coverup must be determined a highly unusual circumstance.

Defendant stated in *Schweiker v. Hansen*, 450 U.S. 785 (1981) the Court suggested estoppel against the government might lie in limited circumstances where, in addition to the traditional elements of estoppel, "affirmative misconduct" on the part of the government is shown. Ninth Circuit case law has now clearly established that affirmative misconduct must be shown for estoppel to lie as against SSA. Appellant has clearly established there was a deliberate lie and a pattern of false promises on the part of SSA. Therefore, she has met the requirement of equitable estoppel. The deliberate lie by G. McArdle and pattern of false promises warrant relief sought by Appellant.

Defendant stated in *Watkins v. U.S. Army*, 875 F. 2d 699 (9th Cir. 1989) and 498 U.S. 957 (1990), Judge Pregerson writing for the majority stated that the army's conduct "went far beyond a mere failure to inform or assist" and that "the case does not merely involve misinformation provided by government agents" but a pervasive pattern of false promises and ongoing active misrepresentation by army officials "acting well within the scope of their authority." The instant case does not merely involve misrepresentation but a pervasive pattern of false promises and ongoing active misrepresentation by SSA officials. Misinformation was

given Appellant in February 1991 when she went to the District office followed by the deliberate lie of G. McArdle on April 2, 1991 and letters from the Administration informing her that she was eligible and would receive widow's benefits. In December 1995 she was informed she was not eligible for widow's benefits.

Had G. McArdle actually called Appellant as she noted on April 2, 1991, it would have been recorded by February 1995 when Appellant personally went to the District office to make sure she was entitled to the benefits and she was assured she was eligible for widow's benefits. The so-called telephone call by G. McArdle has not been proven by Defendant to have occurred.

In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Court stated, "But it remains true that we need not embrace a rule that no estoppel would be against the government in any case in order to decide this case. We leave for another day whether an estoppel claim would ever succeed against the government." The Court realized that there would be cases which warranted an estoppel claim against the government. The instant case would meet that requirement. Claimant's widow's benefits are based on her husband's contributions to Social Security.

The deliberate lie by G. McArdle rises to the level of and is affirmative misconduct.

3.

Petitioner Attempted to Reduce Her Hardship

When Appellant was informed she was not eligible for widow's benefits she called her former employer ("IRS")

but was told there were no openings. She also filed a work application with the government but received no answer.

Contrary to Defendant's statement, Appellant retired in June 1995 after being assured she would receive widow's benefits which with her pension would provide for her needs. Appellant testified under oath that she contacted her former employer about a job and also filed an application with the government. There was no evidence presented to refute this testimony.

Ms. Hernandez, an IRS disclosure officer, in response to the ALJ's contacting her reported that when Appellant retired in June 1995 she knew she was to receive widow's benefits and her government pension. This evidence supports Appellant's testimony that when she retired in June 1995 she had received no knowledge about the GPO ("Government Pension Offset").

The District Court had suggested some sort of compromise in the case. Appellant went to the Van Nuys office and requested correction of her own earnings record and that she be allowed to pay the Social Security contributions for six years which had not been done. 20 CFR 404.822 provides for correction of an earnings record after the time limit ends. Those twenty-four quarters in addition to the fourteen quarters recorded would allow Appellant to be fully insured on her own account and she would be entitled to benefits on her husband's account as those would be larger than hers. The Administration could greatly assist in correction of Appellant's earnings record in view of its conduct in this matter.

CONCLUSION

Based on all the evidence Appellant is entitled to widow's insurance benefits. As stated by Judge Pregerson in *Socop-Gonzales v. INS*, 272 F. 3d 1176, 1184 (9th Cir. 2001), a deliberate lie or a pattern of false promises satisfies the requirement of equitable estoppel. Evidence reveals the deliberate lie by G. McArdle on April 2, 1991 and the pattern of false promises by the Social Security Administration. Appellant's husband paid into Social Security from his wages and was fully insured when he passed away.

The Administration's wrongful act has caused serious injury to an innocent person.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRIEDA GILL, Plaintiff-Appellant, v. JO ANNE B. BARNHART, Commissioner, Commissioner of Social Security Administration, Defendant-Appellee.	No. 02-57170 D.C. No. CV-02-03244-DT/CT MEMORANDUM* (Filed Aug. 22, 2003)

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Submitted April 30, 2003**

Before: SKOPIL, FERGUSON, and BOOCHEVER, Circuit Judges.

Frieda Gill appeals from the district court's judgment in favor of the Commissioner of the Social Security Administration, holding that substantial evidence supported

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). Accordingly, appellant's request for oral argument is denied.

the conclusion that Gill was not entitled to widows' benefits. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Gill seeks to estop the Commissioner from offsetting her widow's benefits based on her government pension. Estoppel may not be used against the government as a basis for money claims. *See United States v. Hatcher*, 922 F.2d 1402, 1410 (9th Cir. 1991). Even if a money claim were not involved, estoppel against the government applies only when the person invoking estoppel establishes "affirmative conduct going beyond mere negligence." *Id.* (quotations omitted). Substantial evidence supports the conclusion that the misinformation Gill received resulted from negligence, not affirmative misconduct.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRIEDA GILL, Plaintiff, v. JO ANNE B. BARNHART, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, Defendant.	**No. CV 02-3244-DT (CT)** **ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** **(Filed Dec. 4, 2002)** **THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)**

Pursuant to 28 U.S.C. § 636, the court has reviewed the file *de novo*, including the magistrate judge's report and recommendation and plaintiff's objections.

IT IS ORDERED:

1. The report and recommendation is accepted.

2. Judgment shall be entered consistent with this order.

3. The clerk shall serve this order and the judgment on all counsel of parties of record.

DATED: Dec. 4, 2000

DICKRAN TEVRIZIAN

DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRIEDA GILL,	**NO. CV 02-3244-DT(CT)**
Plaintiff,	**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN A SOCIAL SECURITY CASE**
v.	
JO ANNE B. BARNHART, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,	**(Filed Nov. 13, 2002)**
Defendant.	

This report and recommendation is submitted to the Honorable Dickran Tevrizian, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the magistrate judge recommends that plaintiff's motion for summary judgment be **DENIED** and defendant's motion for summary judgment be **GRANTED** because the decision of defendant Commissioner of Social Security ("the Commissioner") is supported by substantial evidence and is free from material legal error.

BACKGROUND

Frieda Gill ("plaintiff") is a widow who retired from the Internal Revenue Service ("IRS") in June of 1995 when she began receiving a federal pension. She also was awarded Social Security widow's insurance benefits ("widow's benefits") on her deceased husband's account. In December of 1995, the Commissioner determined she had

been overpaid by the amount of widow's benefits she received between June and November of 1995 because her widow's benefits had not been offset by her federal government pension ("GPO"). Although recovery of the paid widow's benefits was administratively waived, payment of widow's benefits was discontinued because of the GPO.

Plaintiff filed Case No. CV 99-08744-DT(CT) in this court. On March 29, 2000, that matter was remanded for further development of the record on the issue of whether the government should be estopped from enforcing the GPO. Following plaintiff's unsuccessful attempt to administratively achieve that result, on June 6, 2002, plaintiff filed her second complaint seeking judicial review of the denial of benefits by the Commissioner pursuant to the Social Security Act ("the Act"). On August 29, 2002, plaintiff, represented by counsel, filed a motion for summary judgment. On September 30, 2002, the Commissioner filed a cross-motion for summary judgment and opposition to plaintiff's motion for summary judgment. On October 21, 2002, plaintiff filed a reply ("reply"). On October 31, 2002, the Commissioner filed a response to plaintiff's reply ("response"). Oral arguments were held before the magistrate judge on November 13, 2002. Stephanie M. Simpson appeared on behalf of plaintiff, and James R. Sullivan appeared on behalf of the Commissioner.

SUMMARY OF ADMINISTRATIVE RECORD

The October 31, 2001 post-remand recommended decision of the administrative law judge ("ALJ") is attached as an exhibit to this report and recommendation

and materially summarizes the procedural and factual record in this case.

Essentially, plaintiff had worked as a disclosure specialist for the IRS for 27 years when she retired in 1995. (TR 65, 81). Plaintiff is currently receiving her federal government pension.

In February of 1991, she applied for widow's benefits under her deceased husband's social security number, and informed the Social Security Administration representative that she would receive a federal pension on retirement. (TR 54-55, 117, 120). There is an unsigned document in the record that reports plaintiff was contacted by phone on April 2, 1991, and told that her widow's benefits would be offset by her government pension. (TR 77). Plaintiff maintains that she was never contacted with this information. (TR 207-08). On April 15, 1991, plaintiff received notification that her application for widow's benefits was approved, and the notification letter was signed by Gwendolyn S. King, the then Commissioner of Social Security. (TR 78, 121).

In February of 1995, prior to her retirement, plaintiff went in person to the Social Security office to inquire about the widow's benefits she would receive when she retired and was informed that she would receive $838 per month. (TR 62, 102).

On July 9, 1995, plaintiff was notified she would receive widow's benefits upon her retirement under her deceased husband's account, beginning in June of 1995. (TR 87). Plaintiff received widow's benefits in June, July, August, September, October, and November of 1995. (TR 99). On December 27, 1995, plaintiff received a Notice of Overpayment, informing plaintiff that she had been

overpaid in the amount of $4992.60. (TR 99-101). The overpayment was due to the Social Security Administration's ("SSA") failure to apply the GPO to plaintiff's widow's benefits. *See* 20 C.F.R. § 404.408a. Plaintiff requested reconsideration, stating that she would not have retired if she had been informed that she would not receive widow's benefits in addition to her federal pension. (TR 103). The request was denied and plaintiff requested a hearing before an ALJ. (TR 107).

On February 26, 1997, plaintiff testified at an administrative hearing, where she was represented by counsel. (TR 46-71). The ALJ granted waiver of the overpayment pursuant to 20 C.F.R. § 416.550, but stated that it was not within his jurisdiction to determine whether the SSA should be estopped from enforcing the GPO. (TR 35). the ALJ found that plaintiff was without fault regarding the overpayment, and that the SSA, not the plaintiff, was obliged to determine the offset effect of any federal pension. (TR 35). The ALJ further found that plaintiff detrimentally relied on the SSA's representations that plaintiff would receive widow's benefits. (TR 35). The ALJ also found that plaintiff's employer had not informed her of the offset effect of her federal pension. (TR 35)

The Appeals Council granted plaintiff's request to review the decision of the ALJ, and affirmed the waiver of overpayment. (TR 6). The Appeals Council declined to estop the SSA from enforcing the offset provision of 20 C.F.R. § 404.408a. (TR 6-7). The Appeals Council noted that there was conflicting evidence concerning whether plaintiff had been advised in a telephone call on April 2, 1991 that the government pension offset ("GPO") would apply to her benefits. Notwithstanding this conflict, the Appeals Council observed that subsequently plaintiff was

informed on more than one occasion that she would receive the full amount of her widow's insurance benefits. (TR 7). This misinformation was the result of a clerical error "keying in" the code in plaintiff's record, which, had it been correctly entered, would have included the correct information regarding the GPO in correspondence with plaintiff. (TR 7). The Appeals Council found that any misrepresentations to plaintiff, based on the "keying in" error, were unauthorized. The Appeals Council, relying on Social Security Ruling ("SSR") 70-19c, found that the SSA was not estopped from enforcing the GPO. (TR 8).

Plaintiff subsequently sought judicial review in this court, and on August 30, 1999, plaintiff filed a complaint in Case No. CV 99-8744-DT(CT). On March 10, 2000, judgment was entered ordering the matter remanded pursuant to sentence four of 42 U.S.C. 405(g) to the Commissioner for further action. The court ordered that the record be further developed with respect to whether plaintiff could have done anything to correct the problem and noted, for example, that the Notice of Award, informing plaintiff that her application for widow's benefits had been approved, was signed by Gwendolyn S. King, Commissioner of Social Security. The court found that the Appeals Council's decision that all erroneous communications were not authorized was not supported by substantial evidence.

After the case was remanded, the ALJ returned the case to the Appeals Council seeking further instruction. (TR 241). The Appeals Council instructed the ALJ to determine: 1) whether the SSA's actions rose to the level of "affirmative misconduct" regarding the issue of estoppel; 2) whether the SSA employee who failed to enter the GPO code into plaintiff's records was not authorized to make

the incorrect statements that the omission caused; and, 3) whether the SSA's misrepresentation of plaintiff's entitlement to widow's insurance benefits caused plaintiff to act in detrimental reliance and whether plaintiff could have acted or did act to remedy any hardship. (TR 241-42).

On September 6, 2001, plaintiff, represented by counsel, testified at a hearing before an ALJ. (TR 199-217). On October 31, 2001, the ALJ again issued a recommended decision that the SSA was not estopped from enforcing the GPO. (TR 184-90). The ALJ found that the SSA did not engage in affirmative misconduct, and that "[w]hile its actions were negligent, there is no showing of a deliberate attempt to misinform [plaintiff], and accordingly, no showing that the negligence rose to the level of wanton disregard of the facts." (TR 190). Moreover, the ALJ observed that "the fact that [plaintiff] . . . did not attempt to find employment to earn additional quarters of coverage on her own account, gives rise to concern as to whether she sustained the necessary injury to warrant recovery under an estoppel theory." (TR 190). Accordingly, the ALJ denied plaintiff's claim that she is entitled to widow's benefits. (TR 190-91). The Appeals Council adopted the ALJ's recommended decision. (TR 175-76).

PLAINTIFF'S CONTENTIONS

Plaintiff alleges that she is entitled to widow's benefits and that the ALJ's decision is not based on substantial evidence.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this court reviews the Commissioner's decision to determine if: (1) the Commissioner's findings are supported by substantial evidence; and (2) the Commissioner used proper legal standards. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996). Substantial evidence means "more than a mere scintilla," *Richardson v. Perales,* 402 U.S. 389, 401 (1971), but less than a preponderance. *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997).

DISCUSSION

1. Estoppel

In considering whether the government should be estopped, the Supreme Court has emphasized the duty of federal courts to "observe the conditions defined by Congress for charging the public treasury." *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380, 385 (1947); *see also Schweiker v. Hansen,* 450 U.S. 785, 788 (1981). In 1989, the Ninth Circuit held that "'where justice and fair play require it,' estoppel will be applied against the government . . . ", but the government "may not be estopped on the same terms as a private litigant." *Watkins v. U.S. Army,* 875 F.2d 699, 706-07 (9th Cir. 1989) (internal citations omitted). The Ninth Circuit determined that beyond the requirements of traditional estoppel, two additional requirements must be met before the government can be estopped. First, the party seeking to raise estoppel must establish "affirmative misconduct going beyond mere negligence." *Id.* at 707; *see also Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001) (finding an immigration context that equitable estoppel

can only serve as a basis for relief against the government where there is "affirmative misconduct"). Second, "estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Id.*[1]

In this case, the legal landscape about which the court is apprised has changed since the parties were first before the court. In its cross-motion for summary judgment and opposition, the Commissioner cites *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), which was not cited by either party in Case No. CV 99-08744-DT(CT). In *Richmond,* the Supreme Court held that while estoppel remains a potentially valid claim against the federal government where there is a showing of affirmative misconduct, the judicial branch may not use equitable estoppel to grant plaintiffs "a money remedy that Congress has not authorized." 496 U.S. at 426 (holding that the Appropriations Clause of the federal constitution precluded "a claim for payment of money from the Public Treasury contrary to a statutory appropriation").[2] In reaching this decision, the Supreme Court observed that otherwise, the natural consequences of a rule that imposed

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[1] The traditional elements of estoppel are: (1) the party to be estopped must know the facts; (2) the party must intend that the party's conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and, (4) the party must rely on the former's conduct to the party's injury. *Watkins*, 875 F.2d at 709.

[2] Like plaintiff in this case, the plaintiff in *Richmond* sought advice more than once from a federal employee and received erroneous information upon which he detrimentally relied. *See Richmond*, 496 U.S. at 416-419.

liability on the federal government "for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advise." *Id.* at 433-34.

One year later, in *United States v. Hatcher,* 922 F.2d 1402, 1409-10 (9th Cir. 1991), the Ninth Circuit reconciled its decision in *Watkins* with the Supreme Court's in *Richmond.* In *Hatcher,* the Ninth Circuit found that equitable estoppel was not precluded in a suit against the federal government where, as with the plaintiff in *Watkins,*[3] the plaintiff did not use estoppel as the basis for a suit against the government for payment of money. *United States v. Hatcher,* 922 F.2d at 1410. The Ninth Circuit interpreted *Richmond* as holding that litigants may not use equitable estoppel against the federal government offensively as a sword to bring a claim for payment of money from the public treasury that is contrary to statutory appropriation. *Id.* (citing *Richmond,* 496 U.S. at 423-24); *see also United States v. Fowler,* 913 F.2d 1382, 1385-86 (9th Cir. 1990) (finding that federal government cannot be estopped where estoppel would permit plaintiffs to retain public funds that Congress has not appropriated); *see also Flick v. Liberty Mut. Ins. Co.,* 205 F.3d 386, 391 (9th Cir. 2000) (finding that *Richmond* held that equitable

[3] In *Watkins,* the plaintiff relied on equitable estoppel to stop the Army from discharging him. *Watkins,* 875 F.2d at 705-10.

estoppel cannot be used to grant plaintiff a money remedy that Congress has not authorized.[4]

Here, unlike the plaintiffs in *Watkins* and *Hatcher*, plaintiff seeks to use equitable estoppel as the basis for a suit against the government for payment of money. Moreover, like the plaintiff in *Richmond,* the award plaintiff seeks would directly contravene the federal statute upon which plaintiff's claim rests. *See Richmond,* 496 U.S. at 424. Accordingly, the court concludes that plaintiff is precluded from estopping the government based on the standard for invoking equitable estoppel as articulated in *Watkins, Richmond,* and *Hatcher.* Plaintiff's discussion in her reply brief of Justice Stevens' concurring opinion and Justice Marshall's dissenting opinion in *Richmond* does not support distinguishing the majority's holding from her situation.

Controlling precedent, which this court is compelled to apply, leads to a harsh and unfortunate result in this case.

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[4] Along with *Watkins,* plaintiff relied on *McDonald v. Schweiker,* 537 F. Supp. 47 (N.D. Indiana 1981), to support her motion for summary judgment. In *McDonald v. Schweiker,* the district court there held that the SSA was estopped from relying on the absence of a prescribed application form to deny the plaintiff old-age insurance benefits beginning when she reached age 62 because she had relied on the SSA's misrepresentation that she needed additional calendar quarters of work in order to apply for benefits and where such computation could only be made by the SSA based on the SSA's records. 537 F. Supp. at 50-52. However, this case is not controlling: 1) it is from the Northern District of Indiana; 2) the case is twenty-one years old and was declined before the Supreme Court's decision in *Richmond;* and 3) unlike the plaintiff in *Schweiker,* plaintiff could have independently concluded based on documents in her possession that she was not eligible to receive widow's pension benefits.

Generally, plaintiff acted with diligence. Plaintiff sought and received advice from the SSA after she provided the SSA with all the necessary information for a determination of her benefits. She received written confirmation of approval of her application by way of a written "Notice of Award" dated April 15, 1991, signed by the Commissioner of Social Security, and continued to receive a series of written notices that she would receive widow's benefits, none of which alerted plaintiff to the fact that the GPO applied to her. (TR 78, 87-88, 90-91, 97-98). While the Commissioner argues that plaintiff was put on notice of the GPO by a pamphlet attached to her Notice of Award (TR 148), given that plaintiff had already submitted to the SSA all information about her government employment by which the SSA could have calculated the GPO (TR 17) and subsequently received several notices about her widow's benefits, it is not obvious that the information contained in the pamphlet should have caused plaintiff to inquire further into the GPO, or that it undermines her claim of detrimental reliance.[5]

The ALJ has found that it was the SSA's obligation to determine the effect of the GPO prior to granting benefits and that plaintiff detrimentally relied on the incorrect representations of the Administration that she would receive widow's benefits. (TR 17, 190). Had she been informed of the GPO, plaintiff testified that she would have continued to work for another one-and-a-half years in order to receive double the pension she is currently

[5] Plaintiff testified that she ultimately did read the information about the GPO on her third reading of the pamphlet after her widow's benefits were denied. (TR 68A).

receiving. (TR 204-06). While the commissioner contends that plaintiff was informed by telephone on April 2, 1991 that any benefits would be offset by her government pension (TR 77), plaintiff maintains that she was never contacted with this information (TR 207-08).

It is unclear to the court what more could reasonably have been expected of plaintiff in her situation.[6] Nevertheless, the law is clear that plaintiff may not use equitable estoppel in the fashion she seeks. As the Supreme Court observed in *Richmond,* "[i]ndeed, it would be most anomalous for a judicial officer to require a Government official . . . to make an extrastatutory payment of federal funds. It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly

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[6] Plaintiff suggests that under 20 C.F.R. § 404.822, she should be allowed to pay into Social Security the amount of money necessary so that she can become fully insured and receive widow's benefits. (Reply at 7). Essentially, plaintiff contends that while she worked between 1970 and 1973, her earnings record indicates no earnings for those years, and the corrected earnings should be posted and she should be allowed to pay into Social Security the required amount for those years so that she can become fully insured. First, this remedy appears to be unexhausted. Although reference to this contention does appear in the administrative record, it seems as if it was proposed more in the nature of a settlement overture. (*See, e.g.,* TR 188-89, 192). The court observes that there is nothing in the record before this court to indicate that plaintiff has filed for a correction of her earnings record under 20 C.F.R. § 404.822. Second, even assuming plaintiff is allowed to correct her earnings record under 20 C.F.R. § 404.822, she cites no authority for the proposition that assuming her earnings record is corrected, she could then pay money into Social Security that would then enable her to become fully insured. *See* 20 C.F.R. §§ 404.820-404.823 (2002). Third, according to the Commissioner, even assuming plaintiff is allowed to both correct her earnings record and pay into Social Security under 20 C.F.R. § 404.822, plaintiff would still be eight quarters short of the requisite thirty-seven quarters to be fully insured. (Response at 3).

spend money in excess of that appropriated by Congress." *Richmond,* 496 U.S. at 430 (citing 31 U.S.C. §§ 1341, 1350).

CONCLUSION

Plaintiff clearly relied on erroneous information provided by the government to her detriment. However, litigants may not use the doctrine of equitable estoppel against the federal government offensively as a sword to bring a claim for payment of money from the public treasury that is contrary to statutory appropriation. *United States v. Hatcher*, 922 F.2d at 1410 (citing *Richmond,* 496 U.S. at 423-24). Furthermore, if the evidence can reasonably support either affirming or reversing the Commissioner's conclusion, the court may not substitute its judgment for that of the Commissioner. *Flaten v. Secretary of Health and Human Services,* 44 F.3d at 1457.

After careful consideration of the record as a whole, the magistrate judge concludes that the Commissioner's decision is supported by substantial evidence and is free from material legal error. Accordingly, it is ordered that plaintiff's motion for summary judgment be **DENIED**, the Commissioner's cross-motion for summary judgment be **GRANTED** and that judgment be entered in favor of the Commissioner.

This report and recommendation constitutes the court's findings of fact and conclusions of law.

DATED: Nov. 13, 2002

/s/ Carolyn Turchin
CAROLYN TURCHIN
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrates and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIEDA GILL, Plaintiff-Appellant, v. JO ANNE B. BARNHART, Commissioner of Social Security Administration, Defendant-Appellee.	No. 02-57170 D.C. No. CV-02-03244-DT/CT Central District of California, Los Angeles ORDER (Filed Nov. 19, 2003)

Before: SKOPIL, FERGUSON, and BOOCHEVER, Circuit Judges.

The panel has voted to deny the petition for rehearing and recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

20 C.F.R. § 404.408a Reduction where spouse is receiving a Government pension.

(a) When reduction is required. Unless you meet one of the exceptions in paragraph (b) of this section, your monthly Social Security benefits as a wife, husband, widow, widower, mother, or father will be reduced each month you are receiving a monthly pension from a Federal, State or local government agency (Government pension) for which you were employed in work not covered by Social Security on the last day of such employment. Your monthly Social Security benefit as a spouse will always be reduced because of your Government pension even if you afterwards return to work for a government agency and that work is covered by Social Security. For purposes of this section, Federal Government employees are not considered to be covered by Social Security if they are covered for Medicare but are not otherwise covered by Social Security. If the government pension is not paid monthly or is paid in a lump-sum, we will determine how much the pension would be if it were paid monthly and then reduce the monthly Social Security benefit accordingly. The number of years covered by a lump-sum payment, and thus the period when the Social Security benefit will be reduced, will generally be clear from the pension plan. If one of the alternatives to a lump-sum payment is a life annuity, and the amount of the monthly benefit for the life annuity can be determined, the reduction will be based on that monthly benefit amount. Where the period or the equivalent monthly pension benefit is not clear it may be necessary for us to determine the reduction period on an individual basis.

(b) Exceptions. The reduction does not apply:

(1) If you are receiving a Government pension based on employment for an interstate instrumentality.

(2) If you received or are eligible to receive a Government pension for one or more months in the period December 1977 through November 1982 and you meet the requirements for Social Security benefits that were applied in January 1977, even though you don't claim benefits, and you don't actually meet the requirements for receiving benefits until a later month. The January 1977 requirements are, for a man, a one-half support test (see paragraph (c) of this section), and, for a woman claiming benefits as a divorced spouse, marriage for at least 20 years to the insured worker. You are considered eligible for a Government pension for any month in which you meet all the requirements for payment except that you are working or have not applied.

(3) If you were receiving or were eligible (as defined in paragraph (b)(2) of this section) to receive a Government pension for one or more months before July 1983, and you meet the dependency test of one-half support that was applied to claimants for husband's and widower's benefits in 1977, even though you don't claim benefits, and you don't actually meet the requirements for receiving benefits until a later month. If you meet the exception in this paragraph but you do not meet the exception in paragraph (b)(2). December 1982 is the earliest month for which the reduction will not affect your benefits.

(4) If you would have been eligible for a pension in a given month except for a requirement which delayed eligibility for such pension until the month following the month in which all other requirements were met, we will

consider you to be eligible in that given month for the purpose of meeting one of the exceptions in paragraphs (b)(2) and (3) of this section. If you meet an exception solely because of this provision, your benefits will be unreduced for months after November 1984 only.

(5) If, with respect to monthly benefits payable for months after December 1994, you are receiving a Government pension based wholly upon service as a member of a uniformed service, regardless of whether on active or inactive duty and whether covered by social security. However, if the earnings on the last day of employment as a military reservist were not covered, January 1995 is the earliest month for which the reduction will not affect your benefits.

(c) The on-half support test. For a man to meet the January 1977 requirement as provided in the exception in paragraph (b)(2) and for a man or a woman to meet the exception in paragraph (b)(3) of this section, he or she must meet a one-half support test. One-half support is defined in § 404.366 of this part. One-half support must be met at one of the following times:

(1) If the insured person had a period of disability which did not end before he or she became entitled to old-age or disability insurance benefits, or died, you must have been receiving at least one-half support from the insured either –

(i) At the beginning of his or her period of disability;

(ii) At the time he or she became entitled to old-age or disability insurance benefits; or

(iii) If deceased, at the time of his or her death.

(2) If the insured did not have a period of disability at the time of his or her entitlement or death, you must have been receiving at least one-half support from the insured either –

(i) At the time he or she became entitled to old-age insurance benefits; or

(ii) If deceased, at the time of his or her death.

(d) Amount and priority of reduction.

(1) If you became eligible for a Government pension after June 1983, we will reduce (to zero, if necessary) your monthly Social Security benefits as a spouse by two-thirds the amount of your monthly pension. If the reduction is not a multiple of 10 cents, we will round it to the next higher multiple of 10 cents.

(2) If you became eligible for a Government pension before July 1983 and do not meet one of the exceptions in paragraph (b) of this section, we will reduce (to zero, if necessary) your monthly Social Security benefits as a spouse by the full amount of your pension for months before December 1984 and by two-thirds the amount of your monthly pension for months after November 1984. If the reduction is not a multiple of 10 cents, we will round it to the next higher multiple of 10 cents.

(3) Your benefit as a spouse will be reduced, if necessary, for age and for simultaneous entitlement to other Social Security benefits before it is reduced because you are receiving a Government pension. In addition, this reduction follows the order of priority as stated in § 404.402(b).

(4) If the monthly benefit payable to you after the required reduction(s) is not a multiple of $1.00, we will reduce it to the next lower multiple of $1.00 as required by § 404.304(f).

(e) When effective. This reduction was put into the Social Security Act by the Social Security Amendments of 1977. It only applies to applications for benefits filed in or after December 1977 and only to benefits for December 1977 and later.